Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

BILLIE J. LITZ, Petitioner,

v.

JOHN HARDY THOMAS.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR PETITIONER

In Propria Persona

Billie J Litz
2906 Gobat Avenue
San Diego, CA 92122
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67 pp

QUESTIONS PRESENTED

One Does the Superior Court of San Diego County, California have the power to make an arbitrary decision (affirmed by the Fourth District Appellate Court, Division One, of the State of California), which ignores state and federal law cited and disregards my constitutional right to due process and a fair trial (Constitutions cited in Clerk's Transcript, Pgs. 166-167) as a citizen of the U. S. and California?

Two Am I, a single woman, age 61, to be denied equal access to the court and protection of the law because I must be, of financial necessity, in propria persona in my independent action for fraud and damages complaint filed August 9, 1993, against the defendant and respondent, in Superior Court of San Diego County, California, Case No. 667516, in an attempt to set aside a judgment which had been obtained by fraud on the court, and both intrinsic and extrinsic fraud or mistake in the previous lawsuit between the same two parties herein, Case No. 595034, in San Diego County, California, which trial ended August 10, 1990, in judgment for the defendant and respondent, even though he perjured himself on the witness stand at trial, on August 9, 1990, by willfully and knowingly misrepresenting the most relevant material fact at issue, (testimony which was not attempted to be impeached by my attorney, even though there was documentary evidence with which this could have been done), and even though I have newly discovered (as of May, 1993) evidence of my attorney's malignant brain tumor illness which was the probable cause of my not being adequately represented and receiving a fair trial in Case No. 595034?

Three In affirming the decision of the lower court, was the Court of Appeal biased in favor of the defendant and respondent, a member of the State Bar of California; and formerly, research attorney and law clerk for Chief Justice Brown (who is now retired from that same Division One, Fourth District, Appellate Court located in San Diego, California); and thereafter, research attorney for the entire court supervising the work of all the other research attorneys?

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--Code of Civil Procedure, Sec. 473, 3rd, 6th paragraphs

Other Authorities:

--4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, Sec. 332 et seq., p.318 et seq.

--8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, Sec. 215, p.618; Sec. 221, p.625, and see cases cited at p.626

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8 Witkin, Cal. Procedure, supra, at Sec. 204, p.602

STATEMENT OF THE BASIS FOR JURISDICTION

Case No. 667516, a Complaint for Fraud - Money Damages (also, an independent action in equity to set aside a judgment obtained by fraud in Case No. 595034), was filed on August 9, 1993, within the three-year statute of limitations, in Superior Court of San Diego County, California.

A temporary judge (at that time) on January 28, 1994, in Oral Argument, sustained a demurrer without leave to amend; and afterwards dismissed the case. (Reporter's Transcript of Oral Argument, Judge's Order, and Judgment of Dismissal are attached in Appendix).

The Fourth District Court of Appeal, Division One, San Diego, California, in Case No. D021030, filed an Opinion on July 5, 1995, entered on October 4, 1995. I am appealing, herein, from that Opinion (attached in Appendix).

The Supreme Court of California, in Case No. S048197, in its discretion, Denied my PETITION FOR REVIEW, filed September 27, 1995 (attached in Appendix).

The statutory provision conferring on the Supreme Court of the United States the jurisdiction to review on a writ of certiorari is 28 U.S.C.A. Section 1257(a):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari....where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.....(of) the United States."

CITED CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES OF AMERICA, Amendment XIV, Section 1 (1868), and the CONSTITUTION OF CALIFORNIA, ARTICLE III, Section I, (New section adopted November 7, 1972). (Quoted Verbatim in Appendix)

STATEMENT OF THE CASE

I, Billie J. Litz, plaintiff and appellant, in propria persona, filed Case No. 667516 (the "instant case"), a verified "Complaint for Fraud - Causing Money Damages to me of $109,000+ in attorney fees and court costs and thousands of dollars in extra mortgage interest," against attorney John Hardy Thomas, defendant and respondent, on August 9, 1993, in the Superior Court of San Diego County, California. (Clerk's Transcript, pages 1-4).

On January 28, 1994, in Oral Argument before Judge Robert C. Baxley, (temporarily assigned that morning, replacing Judge Harrison R. Hollywood), defendant Thomas' Demurrer alleging res judicata and collateral estoppel to my First Amended Complaint was sustained without leave to amend. (Reporter's Transcript and Judges Order are attached). A Judgment of Dismissal was entered April 5, 1994 (attached).

In the Court of Appeal, Fourth Appellate District, Division One (San Diego), State of California, Case No. D021030, the above Judgment of Dismissal was affirmed on July 5, 1995.

Since the Supreme Court of California, in its discretion, denied my Petition for Review, Case No. S048197, on September 27, 1995 (attached), I am appealing from the Opinion of the Court of Appeal (attached).

All that is stated herein is of record in the Clerk's Transcript ("C.T."), and Reporter's Transcript of Oral Argument ("R.T."), although lodged exhibit numbers were used when quoting from documents in my "List of Exhibits - Exhibits 1 through 29, Lodgment with the Court 11/12/93," ("Exhibit No."). The List of Exhibits and my First Amended Complaint and Request to Take Judicial Notice of Case No. 554832, Bloom, et al., are shown in C. T., pages 135-214.

I have alleged in my First Amended Complaint in Case No. 667516, filed November 12, 1993, that I did not have a fair trial and my constitutional right to due process was violated in

Case No. 595034. The Constitution of the United States, Amendment 14, Section 1, and the Constitution of California, Article III, Section 1, were quoted therein. (C. T. , pages 150-51, 159, 166-68, 179, and 204; quoted: pages 166-67).

Throughout the appeal of the instant case, I have continued to assert that I did not have a fair trial in Case No. 595034, and that my money (property) has been taken without due process in violation of my constitutional rights (Appellant's Opening Brief, pages 9, 19, 42, 45-46; Appellant's Reply Brief, pages 6 and 7; Appellant's Petition for Rehearing, pages 3, 14-16; and Petition for Review in the Supreme Court of California, pages 11 and 14, wherein I, again, quoted the Fourteenth Amendment to the United States Constitution, Section 1.

The trial in the fees/malpractice/conversion case (No. 595034) ended on August 10, 1990. Mr. Thomas won judgment for all the fees he alleged I owed to him in January, 1988, when he sued me---$60,678.75, plus interest, and costs of $6,065.50, which, presumably, he has paid to himself from my money he had kept in his client's trust account, at interest, since January , 1988, after returning it thereto after having "converted approximately $44,000 by removing said sum from his client's trust account for approximately one month," according to the Judgment entered on November 7, 1990. I won damages of $359 because of the conversion (approximately one month's interest), not yet paid to me by Mr. Thomas. (C.T. pages 54-56)

Unbeknown to me at the time, during the fees/malpractice/conversion trial, there was intrinsic fraud, extrinsic fraud or mistake, and fraud on the court, and I was, thereby, denied substantive due process.

At the trial, on August 9, 1990, Mr. Thomas willfully, knowingly, deliberately, and maliciously lied on the witness stand under oath in contradiction of a material fact which had already been adjudicated in a previous trial in Bloom, et al, Case No. 554832 in Superior Court of San Diego County, wherein Judge Robert E. May had definitively stated the material fact (Mr. Thomas contradicted), in his Statement of Decision which

was incorporated by reference into the Judgment entered October 18, 1989--ten months **prior** to the above false testimony of Mr. Thomas. Mr. Thomas knew about the Judgment, as did both Mr. Thomas' attorney at the trial, James J. Biggins, Jr. and my attorney, Steven A. Lande. Yet neither of them bothered to inform Judge Ronald L. Johnson or the jury in the trial of Case No. 595034 that there was a Judgment entered already which contradicted Mr. Thomas' false testimony under oath. (Intrinsic fraud: the lie; Fraud on the Court: the lack of disclosure to judge and jury).

Of course, had I known there was documentary evidence which could have been used to impeach the false testimony under oath of Mr. Thomas, such as I found after I began to recover from the shock of the loss of judgment at trial, during psychological therapy in the late spring of 1991, (when I became emotionally able to begin to tackle the task of reading through the tubs of documents and search for a reason why I did not win at trial), there would have been no necessity for the fraud/money damages suit I filed in August, 1993, because, somehow, I would have appealed the fees/malpractice/ conversion case, even though I was flat broke and bankrupt at the time. (That documentary evidence is now in my Lodged Exhibits 1-29, of record in the instant case).

I did not know at the time of the trial, nor within the time when I could have appealed, that Mr. Steven A. Lande, Lande and Rolston, Los Angeles, my attorney at trial, had a malignant brain tumor which affected his memory....causing him to not remember that there were documents he could have used to impeach the false testimony under oath of Mr. Thomas, at trial.

I learned by rumor, in May, 1993, for the first time, that Mr. Lande had a malignant brain tumor. This was confirmed by his law partner, Mr. Arthur L. Rolston, who stated in his letter to me dated October 28, 1993, (of record in the instant case), that the tumor had been growing for some time before the diagnosis was made in June, 1992. Mr. Lande retired from the

practice of law in May, 1993.

The membership office of the State Bar of California lists Mr. Lande's status as "inactive as of May 1, 1993." (Telephone: 415-561-8877).

After the trial ended in the fees/malpractice/conversion case, I went into such a state of shock and disbelief that I had to go for psychological counseling for more than a year; and today, I still suffer a lack of concentration and focus as a result of the trauma.

In Oral Argument on January 28, 1994, before Judge Robert C. Baxley, who had just that morning been assigned my case, along with all the other cases which had previously been assigned to Judge Harrison R. Hollywood, I stated:

> "I go to the law library practically every night ...and...there's a difference in **fraud**[1] and negligence, malpractice, breach of fiduciary duty and conversion. He (Mr. Thomas) was not sued for fraud in the first case...I read that in a court of equity, the Superior Court has the power to give relief from a judgment procured by fraud. And I know that we can't set it aside because of the perjury, which is intrinsic fraud, but extrinsic fraud or mistake " (will do). (Judge Baxley knew about Mr. Lande's malignant brain tumor). "Every criteria to set aside the judgment is already in papers I filed with the Court,"...."a pleading of facts entitling plaintiff to some relief is all that is necessary against a general demurrer." (R.T., pgs. 20A-21A, attached).

I presumed Judge Baxley knew the cases cited and facts stated in my First Amended Complaint in Case 667516, and my Opposition to Mr. Thomas' Demurrer alleging res judicata and collateral estoppel. Obviously, that was not the case, because,

---

1

In California, there is a "Specific Allegations Rule," that fraud is never presumed and, accordingly, must be specifically pleaded which it was not in Case No. 595034. (Appellant's Reply Brief, pages 4-9).

as I stated in the first paragraphs herein, he sustained the demurrer without leave to amend.

Mr. Lande's grossly inadequate representation of me, his client, in the fees/malpractice/conversion trial where he failed to even attempt to impeach the false testimony under oath of Mr. Thomas (when I now know he had the documentary evidence with which to do so, which documents I have lodged as Exhibits 1-29 in the instant case), constitutes extrinsic fraud or mistake. He failed either because his malignant brain tumor was causing memory loss....or because he threw the case to the other side, constituting egregious conduct.

Because it is necessary that I show proof that if Mr. Lande had not been mentally disabled, or otherwise, I would have won the fees/malpractice/conversion case, I have prepared the following chronological statement of the case (which is of record in my First Amended Complaint, Appellant's Opening Brief and Appellant's Reply Brief), which includes details of Mr. Thomas' false testimony under oath, including the willfulness of it, and the way in which it could have easily been impeached had Mr. Lande used the documents he had at the trial.

A. FROM THE BEGINNING - THE DISSOLUTION CASE

On July 25, 1984, I Billie J. Litz, hired attorney John Hardy Thomas, for a flat fee of $750, to represent me in the dissolution of my 33-month marriage to James P. Wucher, and to implement our previously agreed-upon financial arrangement which included preparing escrow instructions necessary to have Security First Escrow Company pay me in a separate check in my name, Billie Litz Wucher, at the time - $61,959.87 from the proceeds of sale of Mr. Wucher's house which had, two days before I hired Mr. Thomas, been placed in escrow, after having been sold to a San Diego attorney, Frederick R. Palumbo.

Respondent Thomas took it upon himself, without consulting me, to obtain a temporary restraining order on the sale of the house which he, then, on September 14, 1984, served on Mr. Wucher and the Security First Escrow Company, even though he knew I had promissory notes signed by Mr.

Wucher in 1980, that stated I was to be paid the above money, or the greater part of it, from the proceeds of sale of Mr. Wucher's house.

I wanted and needed my money. Escrow was scheduled to close on approximately September 21, 1984.

The above-stated conflict of interests between attorney and client is evidenced by Mr. Thomas' attorney bill total by September, 1987, of more than $68,300 in hourly fees and costs.

The vehicle Mr. Thomas used to renege on our flat-fee agreement for $750, and convert to hourly fees, was a two-sentence statement regarding fees he had typed on the Income/Expense Declaration I reluctantly signed on August 31, 1984, upon Mr. Thomas' insistence that I must file with the Court for temporary support.

The first week in August, 1984, in a telephone conversation, I told Mr. Thomas that Mr. Wucher had gone out-of-town on business and had not left me money with which to pay my mortgage due on the 15th. I had never had a late mortgage payment and I was concerned, naive as I was at the time, that my home would be taken from me in foreclosure. Mr. Thomas did not inform me that one could miss a couple or three payments before that could happen. Instead, he told me that I must prepare the figures to put on the Income/Expense form, and he insisted that I do so even after I reminded him that Mr. Wucher had a hot temper and a vindictive nature, and it was my belief that Mr. Wucher would consider my filing for temporary support an act of aggression. Mr. Thomas told me not to worry; that he would take care of it.

Mr. Wucher had, upon our separation and before I hired Mr. Thomas, agreed to pay my expenses until I received from escrow the money he owed me. This is evidenced in the letter, dated August 9, 1984, which Mr. James S. Veltmann, Mr. Wucher's first attorney, wrote to Mr. Thomas in which he set forth the major elements of our financial agreement.

Not only was Mr. Thomas' reply to Mr. Veltmann's letter untimely, in that it took him almost a month to answer, on

September 6, 1984; but by that time he had - conveniently for him - obtained my signature on August 31, 1984, on the Income/Expense Declaration upon which he had typed the two-sentence statement of attorney fees at an hourly rate.

I did not receive copies of the above letters, or know of their existence, until after September 6, 1984, when I received copies in the mail. Neither did Mr. Thomas tell me that there had been a phone call received on August 3, 1984, in which Mr. Veltmann said he would be representing Mr. Wucher. This was not known by me during Mr. Thomas' representation of me. It came to light as "Exhibit 11" in the fees/malpractice/conversion trial which ended on August 10, 1990 -- apparently it was a typed "MEMO" to the file of Mr. Thomas. Both the letters and memo are in my lodged exhibits (Exhibits No. 25 and No. 26).

As I had predicted, Mr. Wucher did become angry and vindictive. Mr. Veltmann was replaced by Mr. Michael Schaefer, and his successors, Hollmann, Dierker, and Wertheimer. Thereafter, the only game was "hard ball," between all the attorneys and Mr. Thomas.

It would have been so much simpler and less costly for me if Mr. Thomas had just picked up the telephone and called Mr. Veltmann and inquired whether Mr. Wucher would have a check for me, since he had previously been paying my expenses in time for me to pay my mortgage by the 15th of the month..

Largely as a result of Mr. Thomas serving a copy of the temporary restraining order on, not only Mr. Wucher, but the Security First Escrow Company with a letter instructing the company that "it was restrained by the Superior Court from assisting in the sale," the house sale was never completed.

Consequentially, I was sued by Mr. Palumbo, the buyer, on December 21, 1984 ; the real estate brokers, Bloom et al., in 1985; and, thereafter, Mr. Wucher sued me for indemnity should he lose money in judgments to the buyer and brokers because of the effect of the temporary restraining order; and other related lawsuits, including the Security First Escrow.

There was much "confusion" surrounding the effect of the temporary restraining order on the sale. Robert E. May, Judge, Superior Court of San Diego County, in Case No. 554832, "Bloom, et al. v. James P. Wucher, Billie Litz Wucher, et al. and Related Cross-Actions, (the "real estate brokers/buyer/indemnity suit"), filed his Statement of Decision which was "incorporated by reference" into the Judgment entered October 18, 1989, stated on page two of his Decision:

> "b. Escrow was to close on or before September 21, 1984."
>
> "d. On or about September 11, 1984, defendant's spouse , as part of a dissolution proceeding, obtained a temporary restraining order which restrained James Wucher from disposing of any real property. The parties to this action were informed of the TRO. Apparently no preliminary injunction was obtained and the TRO was dissolved by operation of law. However, the evidence reflected that all parties to the instant case, including purchasers Palumbo, felt the TRO was still in effect at least through December, 1984. The escrow continued in effect during this period." (Emphasis added).

The above two documents are lodged Exhibit Nos. 6 and 6A. I did not know about the language in the documents until I was preparing my First Amended Complaint in the instant case, in November, 1993. Judge May made no oral statement of decision from the bench. (C. T., pages 155, 187).

On page 99 of the Clerk's Transcript, in the instant case, I named seven attorneys, including Mr. Palumbo, who supposedly "felt the TRO was still in effect at least through December, 1984."

Lodged Exhibit No. 21 contains copies of "Minutes of the Court" for the Order to Show Cause (OSC) hearing originally scheduled for September 25, 1984; continued to October 29, to November 6, and to November 29, 1984, and the box regarding restraining orders is not "x'd." The hearing for

OSC was held on December 6, 1984.

Lodged Exhibit No. 11 is a copy of the "Proof of Personal Service," served on Security First Escrow Company, September 14, 1984, and shows a hearing date of September 25, 1984. The attached copy of the "Temporary Restraining Orders (Family Law Attachment)" was signed on September 11, 1984, by Judge William Kennedy, and there was stated on the bottom of the page in bold letters: "THESE ORDERS SHALL EXPIRE AT THE DATE AND TIME OF THE COURT HEARING UNLESS EXTENDED BY THE COURT."

Lodged Exhibit No. 13 is a court reporter's transcript of the hearing of September 25, 1984, wherein there is no mention of a temporary restraining order on the sale of the house by the judge or the parties present, including Mr. Thomas. Thus, it dissolved by operation of law on that day.

Lodged Exhibit No. 27 is a letter dated November 5, 1984, written by Mr. Palumbo's attorney, to me and Mr. Wucher, with a copy to Mr. Thomas. Therein was a serious threat of the lawsuit to come. The letter states:

> "This letter represents formal notice to you by Mr. Palumbo that he has tendered performance pursuant to the terms and conditions of the contract for the sale and purchase..." (of the house). "Your acceptance of this tender of performance by Mr. Plumbo must be made on or before November 12, 1984, at 5 p.m. by removing the Temporary Restraining Order that has been placed on the property by the dissolution proceeding, Wucher v. Wucher,....which restrains the alienation and transfer of the subject property by Mr. and Mrs. Wucher...." "In the event you do not comply...please be advised that you will be in default of said contract and Mr. Plumbo will pursue any and all remedies in law or equity..."

I was very upset when I received a copy of the above-quoted letter. I told Mr. Thomas that I was really worried about being sued and that I did not want to be sued. I told him to be

sure that there was no temporary restraining order on the sale of the house.

Mr. Thomas had, previously on October 15, 1984, told me that there was no restraining order on the sale, in response to my memo on the subject, which I had written him on Sunday, October 14, 1984, and hand-carried to his office on Monday morning, the 15th, when we spoke briefly about it. (Lodged Exhibit No. 4).

Shown in lodged Exhibit No. 7 is a copy of a document prepared by Mr. Thomas approximately a year later (after I had been sued by the real estate brokers in Case No. 554832, "Bloom, et al."), which I signed on October 28, 1985, under penalty of perjury (believing it to be factual, of course), entitled "Answer of Billie Litz Wucher to Verified Amended Cross-Complaint for Indemnity and Damages," wherein Mr. Thomas stated:

> "On September 11, 1984, the Superior Court issued its routine Temporary Restraining Orders, issued in the Dissolution....which, among many other things, temporarily restrained both parties, in general terms only, from disposing of any property, real or personal, except in the usual course of business, etc. Both James Wucher and Security First Escrow Company were served with a copy of the Temporary Restraining Orders."
>
> "These routine Temporary Restraining Orders stated at the bottom of the page, in capital letters: 'THESE ORDERS SHALL EXPIRE AT THE DATE AND TIME OF THE COURT HEARING UNLESS EXTENDED BY THE COURT.'"

In the next paragraph, Mr. Thomas changed the subject. Thus, Mr. Thomas told the parties and the Court in the above-quoted document that the temporary restraining order was not on the sale of the house. [2]

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Under the next heading herein, "B. FIRST ACTION BETWEEN THE

Because I did not receive from escrow in 1984, the money Mr. Wucher owed me on promissory notes he had signed in 1980, a lawsuit was filed against him on my behalf by Mr. Thomas in 1985, Case No. 536833, in Superior Court of San Diego County, which case was tried seriatim with the dissolution Case No. D 201412, on December 9-10, 1986. Temporary Judge Gerald L. Barry, Jr. (now a permanent judge) awarded me judgments against Mr. Wucher (with no offsets for him) in the full amount, and more, of my claimed amount in the fall of 1984, which was $61,959.87, plus interest. When paid, the total amount of judgment money was at least $80,901, including the $2,000 allowed for Mr. Thomas' attorney fees.

Shown in lodged Exhibit No. 16, at the top of page 2, which is a transcript of Judge Barry's decision from the bench, after trial, is his opinion: "although the home could have been sold, it appears to me, but for a result of the restraining order."

By September 3, 1987, all the judgment money owed by Mr. Wucher had been paid, and Mr. Thomas received the additional final check through Mara Escrow Company in the amount of $73,295.68. The day before the check was cut, Mr. Thomas arranged with the manager to have the check made payable to his law firm, "THOMAS AND TEAFF," (lodged Exhibit No. 24), and to have my name left off the check, even though the escrow company knew that I was judgment creditor of the greater majority of the money, and in contradiction of the escrow instructions letter Mr. Thomas and I signed on July 10, 1987, with enclosures stating the various amounts owed each of us.

In September, 1987, Mr. Thomas wrote me and asked my permission to take the balance of his attorney bill,

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2

PARTIES - CASE NO. 595034 - "the fees/malpractice/conversion case," Mr. Thomas changed his story regarding the temporary restraining order and perjured himself at trial on August 9, 1990 -- intrinsic fraud - for which I sued him in Case No. 667516, the "Fraud/Money Damages" case.

$60,241.93, out of the $73, 295.68 Mara Escrow check to pay his bill, and then send me the balance.

I replied in a letter dated September 29, 1987, and in two successive letters, because he had not replied in a timely manner, that I would be willing to pay him only $6,500.60 out of the Mara Escrow check. I asked him to keep that amount for himself and to send me a check for $66,795.08, the balance. I had made a tally-sheet, which I enclosed with my letter, from figures I received from the manager of Mara Escrow and, according to the judgments, he was entitled to only $6,500.60 and I was entitled to $66,795.08.

In the "P.S." of the letter (lodged Exhibit No. 24), I stated as tactfully as I knew how, that I needed to have the Bloom matter and the effect of the temporary restraining order on the house sale fully resolved.

I received no reply to my letters until his letter of December 9, 1987, in which he enclosed a check payable to me in the amount of $13,053.75, and a receipted attorney bill in the amount of $60,241.93, marked "Paid in Full - 0 Balance."

When I demanded, in my letter of reply, dated December 12, 1987, that he send me the money from the escrow check to which I was entitled as judgment creditor, he did not do so.

Instead, he filed papers, and a hearing was held on January 25, 1988, before Judge Di Figlia in the Law and Motion Department, in which he sought to be allowed to withdraw as my attorney (leaving me with at least two lawsuits for which I would need to hire an attorney). He stated in his moving papers that his reason was that I did not pay my attorney bill.

I filed Opposition papers and appeared in propria persona. I showed the judge the receipted bill for $60,241.93, whereupon the judge stated that Mr. Thomas had been "misleading to the court, to indicate there is money due and owing on a Motion that is filed eight days after you indicate that the client's bill is zero." His Motion to be allowed to withdraw was denied; however, of course, at a later time he was allowed to withdraw. (Lodged Exhibit No. 5).

At the above hearing, January 25, 1988, Mr. Robert Teaff, Mr. Thomas' law partner who was representing Mr. Thomas, served me with a Summons and Complaint, wherein Mr. Thomas sued me for the balance of the attorney bill and more. The total was $60,678.75 and costs.

Mr. Thomas wrote me a letter January 25, 1988, in which he stated that he had the $60,241.93 plus $209 and $2,034 - a total of $62,484.93, in his client's trust account. He did not send me the check which I had previously requested in my letter dated December 12, 1987; and he kept my money in his interest-bearing client's trust account, and never paid me. I had no money with which to pay an attorney to represent me against his lawsuit for fees, or to pay one to handle the two lawsuits still outstanding when he dropped me.

B. FIRST ACTION BETWEEN THE PARTIES - CASE NO. 595034 - "the fees/malpractice/conversion case"

On February 6, 1988, attorney Timothy C. Karen, San Diego, whom I hired on contingency, filed an Answer and Cross-Complaint for Damages, stating two causes of action; Breach of Fiduciary Duty and Professional Malpractice, against Mr. Thomas in the above case. On January 11, 1990, two other causes of action were added by attorney Steven A. Lande: namely, Conversion and Breach of Escrow Agreement. (C.T. , pages 30-50 and C.T., pages 73-76).

In May, 1988, after he had been paid by me $4,000, Mr. Karen was allowed by the judge to withdraw and he did not refund my money, or any part of it, as I requested of him.

On October 4, 1988, I gave attorney Steven A. Lande, Lande and Rolston, (Los Angeles), a retainer check in the amount of $25,000, which I borrowed out of the equity in my home. We signed a Letter of Agreement dated September 28, 1988, stating the terms of his representation of me in Case No. 595034, and the other two outstanding lawsuits; namely, the suit for fraud and conspiracy which Mr. Thomas filed in 1987 against Mr. Wucher (which was later dropped by me on the advice of

Mr. Lande), and the Bloom, et al. case.

When I was seeking to hire an attorney, in the summer of 1988, I had to go to Los Angeles because I could find no attorney in San Diego willing to take a malpractice case against a fellow attorney in San Diego.

I found Mr. Lande through a long-term personal friend. His law firm, Lande and Rolston, was rated very highly in Martindale-Hubbell.

I was very impressed with Mr. Lande when I first met him on August 11, 1988, when, at my expense, he came to San Diego to look at the court files to determine whether he would represent me. Mr. Lande was articulate and aggressive, and extremely intelligent -- all qualities I needed in an attorney.

Mr. Lande reviewed all the files in the various lawsuits I had, past and present, and at lunch we discussed the cases and my ability to pay.

Mr. Lande sent me his bill for the day in San Diego ($225 per hour plus expenses), which he enclosed with his letter dated August 19, 1988, in which he stated:

> "It looks like you have a winner, and if you are committed to seeing it through, so are we"... "Please let me know when the loan comes through, and I will then forward you a written retainer agreement for the various cases we will be taking over on your behalf."

The above-quoted letter and a copy of my $25,000 retainer check dated October 4, 1988, is shown in lodged Exhibit No. 15.

Mr. Lande and I had discussed at lunch that I had no money, other than borrowing it from the equity of my home. He quoted the sum of $25,000 to handle all my matters through to completion; however, the Letter of Agreement we signed subsequently, indicated there might be more to pay. I felt that I had no other choice than to sign if I wanted to defend myself against Mr. Thomas' fees lawsuit, so I signed on faith that the

bill could not run much more than that.[3]

In the fees/malpractive/conversion case, Mr. James J. Biggins, Jr., a San Diego attorney, represented Mr. Thomas. In his discovery deposition on April 18, 1989, (partial transcript is

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The $25,000 retainer was used and more money was requested. On December 4, 1989, after taking a second mortgage equity loan on my home, I gave Mr. Lande a check in the amount of $7,500; and in the future I gave him other checks. In total, I paid him in excess of $36,500. Also, when I had no more money I could borrow, I signed a lien in his favor on the money of mine which Mr. Thomas held in his client's trust account ($62,484.93 plus interest since January, 1988).

After the trial in Case 595034 ended on August 10, 1990, Mr. Lande billed me on September 1, 1990, $92,527.62. This was in addition to the $36,500 I had already paid him. I was forced into Chapter Seven Bankruptcy on September 17, 1990.

In early 1991, Mr. Lande filed a lawsuit against Mr. Thomas, et al., Case No. 633177, in Superior Court of San Diego County. He asked and I signed on April 4, 1991, a Declaration regarding a preliminary injunction Mr. Lande was requesting on the money in Mr. Thomas' client's trust account. (Lodged Exhibit No. 20; C.T., pages 77-87).

After approximately one year, Mr. Lande dropped his lawsuit against Mr. Thomas, and in the court file there is no record of who received my money in Mr. Thomas' client's trust account.

In Appellant's Reply Brief, on pages 16-17, I complained that even though I had asked Mr. Thomas, he had not made a full accounting of the funds which were in his client's trust account at the end of trial in Case No. 595034. I stated that the County Records in San Diego show no Writ of Execution or Satisfaction of Judgment, which is highly irregular. I am entitled to a Satisfaction of Judgment and I cannot prepare one for Mr. Thomas' and/or Mr. Lande's signature because I do not know the exact amounts and who received what amount.

In Clerk's Transcript, pages 316, 328 and 332, letters show that I questioned Mr. Thomas about why he has not paid me the $359 I won in judgment after trial in Case No. 595034. He stated in his letter dated March 10, 1994, that he has paid me: "I deducted that amount from the jury verdict which you owed me. This was done more than three years ago."

Surely, the amount of the judgment, less the $359, did not come out to be exactly even with the total amount of $62,484.93 plus interest he held in his client's trust account since January 1988. I am entitled to a full accounting.

lodged Exhibit No. 8), Mr. Thomas waffled and wavered for approximately 40 pages of the transcript, and finally testified as follows, when Mr. Lande asked him questions about the temporary restraining order:

> "Q. My question is, if you didn't have a hearing on the 24th or 25th of September and it was to October, which it was, what happened on the restraining order?
> "A. I assume it stayed in effect.
> "Q. Because why would it stay in effect?
> "A. Well, in your question, if the hearing were continued, it leaves a restraining order, in fact. Maybe it does; maybe it doesn't. I'm not sure. If the Court doesn't order, maybe it doesn't. I don't know.
> "Q. Do you know if the Court in this case ordered it or not?
> "A. No, I don't."

On August 9, 1990, the day before the trial ended in Case No. 595034, Mr. Thomas testified under oath before the jury and Judge Ronald L. Johnson (Lodged Exhibit No. 9), that he and I "met in his office on October 16, 1984," and:

> "She did not want to release -- to have the restraining order released ...".

In view of the fact that Judge May's Statement of Decision incorporated by reference into the Judgment filed approximately ten months before Mr. Thomas testified above, stated:

> "the temporary restraining order was dissolved by operation of law,"

it is implausible that Mr. Thomas would be in his office discussing with me whether or not to release a temporary restraining order, when he knew it had expired on September 25, 1984, because that is what he had told the parties and the Court when he prepared (and filed on December 16, 1985) the above-quoted "Answer of Billie Litz Wucher" I signed under penalty of perjury, in the Bloom case. Mr. Thomas also was bound to have known what Judge May had stated in his

Judgment.

The only logical conclusion that can be reached is that Mr. Thomas willfully , knowingly, premeditatedly, and maliciously lied under oath in regard to a material fact regarding the temporary restraining order on the sale of Mr. Wucher's house. The above shows his clear intent to defraud me of judgment money , rightfully mine, that he otherwise would have had to pay me in Case 595034.

The transcript of trial testimony on August 9, 1990 (Lodged Exhibit No. 9) shows that Mr. Lande made no serious attempt to impeach the above false testimony under oath of Mr. Thomas. His only question to Mr. Thomas was whether or not he had sent me a CYA letter. (He had not).

As part of my First Amended Complaint in the instant case, I quoted the definition of "fraud on the Court" as shown in Black's Law Dictionary:

> "A scheme to interfere with judiciary machinery performing task of impartial adjudication, as by preventing opposing party from fairly presenting his case or defense. Finding fraud on the court is justified only by the most egregious misconduct directed to the court itself....fabrication of evidence by counsel and must be supported by clear unequivocal and convincing evidence. It consists of conduct so egregious that it undermines the integrity of the judicial process." (Emphasis added).

The above quote and the facts are in Clerk's Transcript, pages 150-55. I shall summarize:

It is obvious that at the trial in Case No. 595034, Judge Ronald L. Johnson, and the jury, were unaware that Judge Robert E. May's Statement of Decision incorporated by reference into the Judgment in Bloom, et al., entered October 18, 1989, definitively stated that the "TRO was dissolved by operation of law."

Mr. Biggins asked me questions during the trial in Case

595034 regarding the "litigation in the El Cajon Court," the place of the Bloom trial; and I saw Mr. Biggins in the courtroom at the Bloom trial. Obviously, he was there and interested in the findings of the judge since I had cross-complained against his client, Mr. Thomas, for breach of fiduciary duty, malpractice, conversion and breach of escrow agreement, all relating to the Bloom case. Mr. Steven A. Lande represented me in the Bloom, et al. case, and he too was interested in the outcome and knew what was stated in the Judgment.

Yet neither Mr. Biggins nor Mr. Lande informed Judge Ronald L. Johnson that there was a Judgment of Judge May's, and as a result, Judge Johnson and the jury did not know that Mr. Thomas had to be lying under oath on August 9, 1990, at trial, when he testified that I "did not want to release -- to have the restraining order released" when we met "on October 16, 1984, in his office."

I was unaware until November, 1993, of the gravity of the above - that it was fraud on the court - and that the Statement of Decision and Judgment in Bloom stated with specificity that there was no TRO on October 16, 1984.

At the fees/malpractice/conversion trial, I relied upon Mr. Thomas, on officer of the Court, to tell the truth; and I relied upon my attorney, Mr. Lande, and Judge Ronald L. Johnson to make sure the truth was told to the jury.

Mr. Steven A. Lande, also, lied under oath at the trial in Case. No. 595034, on August 9, 1990; Exhibit 18 is a transcript of his testimony. He had himself sworn in at the beginning of his closing argument to the jury and testified:

> "I resent something he (James J. Biggins, Jr.) said to you in his opening remarks which was totally uncalled for in my opinion and it's not true, and that was I received a retainer from Mrs. Litz when she called me from San Diego and asked me to represent her....I came back from vacation. There was $25,000 in my trust account, and I have no idea where she got it from, and to suggest to

make her borrow it against her house, I resent that." The underscored, of course, is the lie. Previously herein, I quoted from Mr. Lande's letter to me dated August 19, 1988, in which he stated:

> "Please let me know when the loan comes through, and I will then forward you a written retainer agreement..."

As previously stated herein, I borrowed the $25,000 from the equity in my home. (Exhibit 15).

There were several instances when Mr. Thomas lied on the witness stand during the trial in Case No. 595034. One was such a besmirchment of my good name and character that I, (in Appellant's Petition for Rehearing pages 6-9), attempted to have the Court of Appeal change its Opinion (See attached Opinion: top of page 6A, re contempt; and page 7A, footnote 4, where the besmirchment was repeated, as if true). I failed in my attempt because I was not allowed to attach the documents (which proved that I was not restrained, so I could not possibly have been found in contempt of court, despite Mr. Thomas' testimony at the fees/malpractice/conversion trial) to Appellant's Petition for Rehearing . I, then, filed a timely motion, Request to Have Necessary Documents as Exhibits in Petition for Rehearing. July 20, 1995, and I attached the documents thereto. The Court of Appeal denied my Request on July 31, 1995 (attached), after having denied my Petition for Rehearing July 25, 1995 (attached).

Mr. Thomas had testified before the judge and jury in Case. No. 595034, that at the hearing on December 6, 1984,

> "I accomplished her not being held in contempt of court...The judge could not find her in contempt of court. If Mr. Schaefer (Mr. Wucher's attorney) had known what to do, he would have found her in contempt of court." (Exhibit No. 9, pages 12-13).

Mr. Lande made no attempt to refute the testimony of Mr. Thomas' which made me look like a sleazy character to the jury, even though he had the same documents I attempted to

show the Court of Appeal, above-stated. Since I am a law-abiding citizen, this hurts me and grieves me.

C. AFTERMATH OF TRIAL IN CASE NO. 595034 -LITZ BANKRUPT AND EMOTIONALLY ILL

After the trial ended on August 10, 1990, I did not know how Mr. Thomas got the idea that we had met in his office and I did not want to release the temporary restraining order. I thought that somehow he must have believed that to be true. I did not know there was evidence in documents (as I have shown in my exhibits herein) to prove that he lied under oath at the trial. It was never my intention to in any way interfere with the escrow closing on Mr. Wucher's house sale. I was to receive, at that time, the money Mr. Wucher owed me on promissory notes and design fee contract he had signed, and that fact was stated on the documents themselves. I had in 1980 loaned Mr. Wucher money to renovate his house so he could sell it. I needed and wanted my money in September, 1984, when escrow was scheduled to close. I am not masochistic.

I was devastated and stunned by the defeat; and I was hurt that the truth did not come out at the trial. I was bewildered that Mr. Lande should feel the need to, voluntarily, get on the witness stand and lie about how he received my $25,000 retainer check -- causing the jury to believe that it came easily for me to hand an attorney $25,000, when, to the contrary, it was very hard for me to mortgage my house and give him the money.

I went into a deep depression from which I have not yet recovered, and was treated in private, at least weekly, sessions by Catholic Charities psychological counselors for more than a year after the trial ended. Not only did I need counseling for the first (and only) time in my life, I had to accept charity for the first time in my life. This too was very upsetting to me.

In Appellant's Opening Brief, page 21, I quoted the letter sent to me at my request by Peter McDade, Ph.D.,

Director of Clinical Services, Catholic Charities, dated April 27, 1994, which confirms the fact that I was "seen for counseling from 8/30/90 through 9/12/91 on a weekly basis." I offered to provide a copy of the letter, upon request, to the Court of Appeal. I told Judge Baxley in Oral Argument that "after the trial I had gone to counseling for severe emotional distress, losing a case I should have won,....", but I was unable to have a letter to show him at that time because Dr. McDade's secretary was visiting her family in the Philippines when I made my request for a letter in January, 1994, in preparation for Oral Argument. (R.T., page 3).

As previously stated, on September 17, 1990, I filed Chapter Seven Bankruptcy. Mr. Lande's attorney bill dated September 1, 1990, was $92,527.62. (I had already paid him in excess of $36,500). Filing bankruptcy upset me greatly; I had previously always paid my bills on time and had an excellent credit rating.

In Bankruptcy Case No. 90-90642-H7 , Household Bank, a credit card company, sued me for fraud. Mr. James J. Biggins, Jr., Mr. Thomas' attorney, on June 25, 1991, voluntarily appeared (was not subpoenaed) and testified against me. I told Judge John J. Hargrove that I had fully expected to win the fees/malpractice/conversion case and the judgments would have more than paid my debt.

In the process of the above trial, my attorney, Elizabeth R. Wilkie, Wilkie and Printz, San Diego, asked Mr. Biggins several questions which exonerated me at the trial. Even Mr. Biggins had to admit, in his testimony under oath, that if circumstances had been as I testified at the fees/malpractice/conversion trial, his client, Mr. Thomas would have been guilty of malpractice, as shown below (from the transcript of the trial, Exhibit 3, pages 2-5; and C.T. pages 156-159):

> Q. "If the facts had been as alleged by Mrs. Litz, the jury had reached a determination the factual situation was that Ms. Litz and Mr. Thomas did not agree

together not to release the temporary restraining order, did you form an opinion as to whether or not such an action taken by an attorney would have constituted malpractice?"

A. "My opinion is had Mr. Thomas maintained the restraining order, that is resisted efforts to have it dissolved without explaining the risks to Ms. Litz and without her permission, if he had done that unilaterally and if he hadn't fully informed her that there was a risk of litigation and the risk that the case might be complicated, had he in fact either done those things or failed to do those things I think that would have been exposing her to an unreasonable risk of just what is; that is more litigation and counter litigation, and so my answer if I understood your question is qualified yes."

Not only was Household Bank unable to prove their charges against me, but I won from them, judgment in excess of $3,000 for Ms. Wilkie's attorney fees and costs. There was other valuable testimony that Ms. Wilkie was able to bring to light through Mr. Biggins' testimony that day, showing that I was not the culprit in the failed escrow of Mr. Wucher's house. (Exhibit No. 3, pages 6-16--referring to Exhibit No. 4).

I had a glimmer on that day, June 25, 1991, that Mr. Lande in August , 1990, in the trial in Case No. 595034 had the ammunition to impeach the false testimony under oath of Mr. Thomas. But, it was too late to appeal the case, and I was flat broke and bankrupt and emotionally ill and in counseling; and at that time, of course, I had no idea that Mr. Lande had a malignant brain tumor.

I tried to learn to live with the fact that I am now alone and cheated out of my life savings, everything that my late husband and I had worked for our twenty-six year marriage, knowing that Mr. Thomas had actively, from the first days of his representation of me in my dissolution of my second marriage, defrauded me.

When I hired Mr. Thomas in July, 1984, my home mortgage payment was $442.75 per month. Today it is more than $1,700, and otherwise I live in poverty. I owed approximately $51,000 on my home mortgage in 1984; and I had owed to me more than $61,900 by Mr. Wucher which he said he would pay me at that time--more than enough to pay off my home mortgage and for a simple divorce.

I realized in May, 1993, after I discovered Mr. Lande's illness, that I did not have a fair trial and that my money had been taken without due process in Case No 595034.

That is the reason I filed the case for fraud/money damages against Mr. Thomas, Case No. 667516, on August 9, 1993, within the statute of limitations for fraud.

ARGUMENT FOR ALLOWANCE OF THE WRIT

In 28 U.S.C.A. Section 1257, Note 81. Generally, is stated:

> If both of the requirements that a federal question has been raised and decided in the state court below do not appear on the record, the appellate jurisdiction of the Supreme Court fails. Illinois v. Gates, Ill.1983, 103 S. Ct. 2317, 462 U.S. 213.

In 28 U.S.C.A. Section 1257, Note 84. Federal Questions Generally, is stated:

> Whether rights under federal Constitution asserted by appellant were given due recognition by Georgia Court of Appeals was a question as to which appellant was entitled to invoke judgment of United States Supreme Court, and it was within province of the Supreme Court to inquire, not only whether the right was denied in express terms, but whether it was denied in substance and effect, by putting forward nonfederal grounds of decision that were without fair or substantial support. (Emphasis added). Staub v. City of Baxley, Ga. 1958, 78 S.Ct.. 277, 355 U.S. 313, 2 L.Ed. 2 d 302.

The Superior Court of San Diego County and the Court of Appeal, Fourth Appellate District, Division One, San Diego, California, have ignored my asserted constitutional right to due process and a fair trial. There is no decision in that regard in either the Order Sustaining Demurrer to First Amended Complaint or the Judgment of Dismissal in the Superior Court, nor in the Court of Appeal Opinion (all attached in Appendix). That is why I cited above the "Staub v. City of Baxley, Ga." case.

I cannot do anything about the conspicuous absence of any acknowledgment of my assertion of my constitutional rights except complain to the United States Supreme Court and pray that my petition will be granted. The state courts have denied my right to a fair trial and due process by putting forward nonfederal grounds of decision that are without fair or

substantial support. (See footnote "1" in Statement of the Case, herein).

The following are my assertions from Clerk's Transcript, pages 141-207, which pages show my Request to Take Judicial Notice and my First Amended Complaint in Case No. 667516:

> Page 144 - "LITZ declares that her constitutional right to a fair trial has been violated and she has not had due process of law. LITZ asks the Court to take the above facts into consideration when making the decision as to whether or not LITZ can state a CAUSE OF ACTION meaningful enough to be within her rights to try THOMAS on the issue of FRAUD and the three causes of action she has stated in this FIRST AMENDED COMPLAINT for FRAUD."
> Page 150 - "14. LITZ did not receive a fair trial and due process of law in CASE NO. 595034 (THOMAS v. LITZ, and cross-complaint) which hereinafter LITZ shall refer to as the 'fees/malpractice/conversion' case."
> Page 159 - "22. On the same basis, LITZ alleges she did not have a fair trial and due process of law in the fees/malpractice/conversion case tried on July/August, 1990 before JUDGE JOHNSON and a JURY, whose verdict was skewed by the fact that THOMAS did not testify in truth about a relevant, material fact and that the JURY was not aware of the former DECISION of JUDGE MAY."
> Page 160 - "23. An additional reason why LITZ did not receive a fair trial is that STEVEN A. LANDE, her attorney since October, 1988, when she gave him a retainer out of the loan she had made on the equity in her house,....was very probably mentally incapacitated when the trial for fees/malpractice/conversion took place July/August, 1990. It was evident that LANDE was not the sharp, quick-thinking attorney she had hired in 1988. 24. LITZ learned this past summer, that STEVEN A. LANDE had been diagnosed with a malignant brain tumor."
> Page 166 - "LITZ DID NOT RECEIVE A FAIR

TRIAL AND DUE PROCESS OF LAW HAS BEEN DENIED BECAUSE OF FRAUD.....28. The Constitution of the United States, Amendment 14, Sec. 1 states:

".....nor shall any State deprive any person of life, liberty, or property without due process of law....(Quoted in its entirety)." Page 167 - "The Constitution of California, Article III., Sec. 1, states: (Quoted in its entirety)."

Throughout the appeal in the instant case, Case No. 667516, I have continued to assert that I did not have a fair trial in the former case, Case No. 595034, and that my money (property) has been taken without due process in violation of my constitutional rights. This is shown in Appellant's Opening Brief, pages 9, 19, 42, 45-46; Appellant's Reply Brief, pages 6 and 7; Appellant's Petition for Rehearing, pages 3, 14-16; and Petition for Review in the Supreme Court of California, pages 11 and 14, wherein I, again, quoted the Fourteenth Amendment to the United States Constitution, Section 1.

STATE STATUTES CITED IN RECORD:

CALIFORNIA CIVIL CODE Section 3528:
First duty of equity is to be equitable; court of equity is bound to consider substance over form. (Appellant's Opening Brief).

CALIFORNIA CIVIL CODE Section 3523:
For every wrong there is a remedy. (Appellant's Petition for Review--Supreme Court of California).

OTHER AUTHORITIES CITED IN RECORD:

BENDER'S POINTS AND AUTHORITIES, BOOK 5A, FORMS 206 and 207 - Opposing; Demurrer (Civ. Proc. 430.10(e). [See Appendix: Oral Argument, pg. 21A]. Form No. 206: (page 452) - RELIEF FROM JUDGMENTS "The Court should grant relief in equity and set aside the judgment because of extrinsic mistake, in that the aggrieved party was deprived of a hearing on

the merits due to the disability of her attorney." Form No. 207: (page 457) "The Court should grant relief in equity and set aside the judgment because of extrinsic mistake in that the judgment was the result of the inexcusable neglect of the aggrieved party's attorney and the neglect was of such an extreme degree that it amounted to positive misconduct."

U. S. Supreme Court Rule 10(b) is most applicable to my case:

> "A state court of last resort has decided an important federal question in a way that conflicts with the decision.....of a United States court of appeals."

One such decision is shown below. In U.S. CODE ANNOTATED, CONSTITUTION--DUE PROCESS, 1995 Supplementary Pamphlet covering years 1988 to 1994, Amendment XIV, Section 1, Note 1453, Persons Bound by Judgment:

> Due process ordinarily demands that, in a civil case, notice and opportunity to be heard must be provided to any party whose liberty or property interests may be adversely affected by proceeding; any party who is not provided with required notice of proceeding and opportunity to be heard is not bound by judgment that results from proceeding. (Emphasis added). Battle v. Liberty Nat. Life Ins. Co., N.D. Ala. 1991, 770 F.Supplement 1499.

My attorney at the fees/malpractice/ conversion trial was suffering from memory loss due to a malignant brain tumor which has subsequently caused him to retire from the practice of law. Only God knows when the brain tumor began to affect him; however, there is evidence that he did not represent me at trial and it appears as if he actively betrayed my cause (see my Statement of the Case, herein). Thus, I did not have an opportunity to be heard at trial in Case No. 595034, and I should not be bound by the judgment (which should have been

set aside in the instant case, Case No. 667516).

It has been said that the "touchstone of due process under both State and Federal Constitutions is fundamental fairness." Surely, I have not been treated fairly. I am an American citizen.

Mr. Justice Thurgood Marshall, in James v. Valtierra, 402 U.S. 137, 145 (1971) stated:

> "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."

I have been impoverished by the legal proceedings I have had to endure in order to get a simple dissolution. Surely, that is not fair and there is a remedy.

CONCLUSION

For all the foregoing reasons, I respectfully urge that this petition for writ of certiorari be granted.

Respectfully submitted,

Billie J. Litz

Billie J. Litz (In Propria Persona)
2906 Gobat Avenue
San Diego, CA 92122
Phone: (619) 455-9471

Dated: December 19, 1995

APPENDIX

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

Filed--Stephen M. Kelly, Clerk
Jul 05 1995
Court of Appeal Fourth District

BILLIE J. LITZ,	)	
Plaintiff and Appellant,	)	OPINION
v.	)	D021030
JOHN HARDY THOMAS,	)	
Defendant and	)	(Super. Ct. No. 667516)
Respondent.	)	
	)	

APPEAL from a judgment of the Superior Court of San Diego County, Robert C. Baxley, Judge. Affirmed.

Billie J. Litz, in propria persona, appeals a judgment of dismissal entered after the trial court sustained without leave to amend her first amended complaint for damages for fraud. The defendant is attorney John Hardy Thomas who represented Litz between 1984 and 1987 in several matters, including the dissolution of her marriage to James P. Wucher, debt collection from Wucher and other litigation.

When unpaid fees Thomas had billed to Litz exceeded $60,500 in January 1988, Thomas sued Litz for the sum billed plus interest, attorney's fees and costs. (San Diego Superior Court case no. 595034.) Litz cross-complained for damages for breach of fiduciary duty and professional malpractice praying for a principal amount of $62,000 as well as other forms of monetary damages. Litz's cross-complaint was tried to a jury which returned special verdicts finding Thomas was not negligent, did not unlawfully convert property of Litz and did not breach his fiduciary duty to Litz.[1] On the complaint

[1] With respect to the conversion cause of action in Litz's first action against Thomas, contrary to the jury's verdict, the trial court found as a matter of law that Thomas converted approximately $44,000 →

the jury awarded Thomas $60,678, and on November 7, 1990, the court entered an appropriate judgment against Litz in the first action in case number 595034. Litz did not appeal.

Litz filed the present action August 9, 1993, in propria persona. Litz's first amended complaint presents a theory that Thomas lied while testifying in Litz's first action for legal malpractice, and contains an undercurrent of ineffective counsel representing her in that case, all of which she claims amounted to extrinsic or intrinsic fraud entitling her to vacate that first judgment. We determine the demurrer was properly sustained without leave to amend, and thus affirm the judgment of dismissal.

FACTS

Our Review

The long-settled rule applicable to cases where a demurrer is sustained without leave to amend is that for the purpose of reviewing the ruling we "'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusion of fact or law.'" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318, quoting Serrano v. Priest (1970 5 Cal.3d 584, 591.) We disregard the contentions, deductions or legal hyperbole which might surround the factual allegations. (Thomaselli v. Transamerica Ins. Co. 1994) 25 Cal.App.4th 1766, 1768, fn. 1.)

Litz's first amended complaint for "FRAUD CAUSING MONEY DAMAGES TO (LITZ) in the amount of $109,000+ in Attorney Fees and Court Costs, and Thousands of Dollars in Extra Mortgage Interest" (complaint) is over 60 pages in length and makes reference to a separate packet of 29 exhibits, in many of which there are handwritten and "post it" notes containing conclusions,

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[1] he held for Litz by removing this sum from his client's trust account for approximately one month, with resultant damages to Litz in the sum of $359. The court awarded Litz judgment for this sum after awarding Thomas a judgment in the sum of $60,678.75 plus costs of $6,065.50 on his complaint for attorney's fees in the first action.

argument and references to other exhibits. There also is an abundance of yellow marker highlighting within the exhibits. The complaint is full of legal and factual conclusions as well as evidentiary, rather than ultimate, facts. (See 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, S 332 et seq., p. 381 et seq.) Thus, we profess some misgivings in our compliance with the general rule that the factual statements in the following paragraphs are deemed admitted.

Trial Court's Proceedings in Present Action

In ruling on the demurrer the trial court took judicial notice of the superior court file in the first action (no. 595034) in which Litz cross-complained against Thomas for breach of fiduciary duty and professional malpractice. The trial of the first action was completed in August 1990; judgment was entered in November 1990. A reporter's partial transcript containing testimony of Thomas in the first action is one of the exhibits in the present case which Litz filed in August 1993. This is the evidence Litz cites as the basis for her claim "Thomas perjured himself in regard to the most relevant material matter in the whole of the case in 595034."

Trust of Present Action Against Thomas

Part of Thomas's testimony of August 9, 1990, in the first action was that in October 1984, Litz refused to allow a sale of a house to be completed by not releasing a temporary restraining order (TRO) issued in her dissolution action prohibiting the parties from transferring any property. Thomas testified real estate agents had recommended to Litz that she permit the sale to be completed with the proceeds withheld until Litz and Wucher agreed on the division of the proceeds; however, Litz refused to authorize the release. Thomas's testimony on this point was, in part, "(Litz) did not want to release -- to have the restraining order released because she felt this was the only legal pressure that she had for Jim Wucher to pay her money now without this thing having to stretch on for a long time."

Litz claims that Thomas knew or should have known the TRO had dissolved by its own terms as of a September

1984 hearing date at which the hearing on temporary support for Litz in the dissolution matter was continued.[2] In this connection Litz makes such allegations as "LITZ believes that (Thomas) did know that there was no TRO and should have so testified at the fees/malpractice/conversion trial; yet he lied and said LITZ did not want to release the TRO," and "THOMAS chose to not tell that there was no TRO remaining on the sale." (Emphasis omitted.)

Litz's complaint points out that had the house sale closed in November 1984, she would have been paid the $62,000 Wucher owed her at that time, the costly actions that followed could have been avoided and she would not have incurred attorney's fees amounting to well over $100,000, as well as the additional debt and extra interest payments to finance the litigation. Her complaint includes an allegation that Thomas's purported strategy in relying on the TRO to prevent the completion of the sale was explored at the first trial.

Thomas's Legal Services for Litz

The background was that Wucher owed Litz almost $62,000 for her professional interior design services performed in 1980 and 1981 for the purpose of renovating the house in which Wucher was living and which she believed Wucher owned free and clear. According to Litz, she and Wucher contemplated the house would be sold and they agreed that Litz would be paid out of the proceeds of the sale.

---

[2] The TRO, issued September 11, 1984, restrained both Litz and Wucher from transferring property, but stated it "shall expire at the date and time of the court hearing unless extended by the court." The hearing date typed in the TRO was September 25, 1984, but on that date Thomas consented to the request of Wucher's attorney, Michael Schaefer, for a continuance to October 29, 1984.

Litz and Wucher married in October 1981.[3] The house did not sell until July 1984 when an attorney agreed to buy it for use as both his office and residence. By then the house was listed on the San Diego Historical Register. The closing date for the sale originally was scheduled to be September 21, 1984, a few days before the initial hearing date set on the order to show cause (OSC) in Litz's dissolution action against Wucher.

In July 1984, soon after the sale of Wucher's house was agreed upon, Wucher and Litz separated and Litz retained Thomas for the dissolution of her 33-month marriage to Wucher. The TRO was served on the escrow holder for the sale of the Wucher house.

In October 1984, the probate of the estate of Wucher's mother was completed with a decree distributing a half interest in the house to Wucher and the other half interest to his brother. Thus, although Litz may have had a community property or other interest in the house in which she had lived with Wucher for about two years and with respect to which she had performed interior design work, she did not have an interest of record. Nevertheless, the persons involved in the sale contract for the house all though Litz was an owner of the house.

In November 1984, a letter from an attorney for the buyer to Wucher and Litz demanded performance of the sale contract for the house and in the process stated, "Your acceptance of this tender of performance by [Buyer] must be made on or before November 12, 1984, at 5:00 p.m. by removing the Temporary Restraining Order that has been placed on the property by the dissolution proceeding, Wucher vs. Wucher, before the San Diego County Superior Court, Case No. D201412, which restrains the alienation and transfer of the subject property by Mr. and Mrs. Wucher," (Emphasis added.)

[3] Litz's November 1993 complaint describes herself as a "59 1/2 year old woman who is ready for her 'golden years' and she is facing utter poverty because of the fraud of the Plaintiff (sic), THOMAS." She also pleads she was a widow who had never been in litigation before she retained THOMAS.

In December 1984, the buyer sued Litz and Wucher on the house sale contract.

In the meantime, Thomas successfully represented Litz in a December 1984 contempt hearing for an alleged violation by Litz of the TRO concerning harassment. Thomas also continued to represent Litz in other matters and obtained two substantial money judgments in her favor against Wucher. In the third quarter of 1987, Thomas collected $73,000 on behalf of Litz. Litz was paid $13,000 of this amount and Thomas retained the balance.

Thomas represented Litz successfully in a suit for a commission by the real estate agents for the buyer in the house sale. Thomas's December 1985 answer to the cross-complaint of Wucher in that action set out the contents of the TRO with respect to transferring property and its statement it expires at the date and time of the court hearing which was stated to be September 25, 1984. Litz was dismissed out of this suit at least by September 1987, and in October 1989, a judgment was entered in favor of Wucher. A portion of the October 1989 statement of decision in the real estate commission case (San Diego Superior Court no. 554832) recites:

> "[0]n or about September 11, 1984, [Wucher's] spouse, as part of a dissolution proceeding, obtained a temporary restraining order which restrained James Wucher from disposing of any real property .....The parties to this action were informed of the TRO. Apparently no preliminary injunction was obtained and the TRO was dissolved by operation of law. However, the evidence reflected that all parties to the instant case, including purchasers . . . , felt the TRO was still in effect at least through December 1984. . . . [¶] In December 1984, the purchasers . . . caused the escrow to be terminated. Based upon the [purchasers'] act of termination, they were not ready, willing or able purchasers."

In September 1987, Litz indicated for the first time she was unhappy with Thomas's services and bills.

Litz's Allegations

Based on (a) Thomas's April 1989 deposition testimony for the first action that he was "not really sure" whether the TRO in the dissolution proceeding was in effect after the initial hearing date of September 25, 1984; (b) the October 1985 answer Thomas prepared in the real estate commission case describing the TRO and its expiration date; (c) a January 1988 statement by the court in a proceeding to be relieved as counsel for Litz's nonpayment of fees that it was "misleading to the court" for Thomas to make such a claim within eight days of sending out a bill marked paid in full; (d) the foregoing statement in the real estate commission case's October 1989 statement of decision that the TRO had been dissolved; and (e) Thomas's August 1990 testimony in the first action describing a December 1984 contempt hearing against Litz in the dissolution action for her alleged violations of the harassment aspects of the TRO,[4] Litz's complaint alleges, in part:

> "THOMAS did intentionally testify to an untruth about the TRO and the part LITZ played at the time the [house] sale should have, and could have taken place.....THOMAS did intentionally testify to an untruth in a matter material to a material issue. It was knowingly and fraudulently done. Since the TRO had been dissolved by operation of law on September 25, 1984, . . . THOMAS should not have been allowed to swear a false oath at the trial when he testified . . . . THOMAS' testimony at Discovery Deposition April 18, 1989, which conflicts with THOMAS' testimony at the trial, August 9, 1990--[citation], wherein

[4] Thomas testified that in the contempt proceeding brought by Wucher against Litz, attorney Schaefer provided "strong evidence" that Litz had violated the TRO by repeatedly telephoning Wucher's place of employment, tying up the telephone lines there; by threatening Wucher with "a lot of trouble" if he did not pay her the amount she claimed; and by entering Wucher's house and rifling through his mail. Thomas testified that if Schaefer had known what to do the judge would have held Litz in contempt.

> THOMAS testified at that time he did not know whether or not there was a TRO at that time, which shows that THOMAS lies about his lies . . ." (Original emphasis.)

Litz also alleges she learned after she filed the original complaint in the present action (August 1993) that in June 1992, approximately 20 to 21 months after the trial ended in the first action (August 10, 1990), the attorney who represented her in the first action was diagnosed as having a malignant brain tumor. The attorney's law partner informed Litz by letter he was told the attorney's tumor may have been growing for as much as six or eight months as of June 1992. The October 28, 1993 letter, part of the augmented record on appeal, opines "there is nothing that indicates that Mr. Lande's current condition was in any way affecting him in July and August, 1990." Litz, on the other hand, alleges the attorney appeared to be impaired and incapacitated and could not represent her as she should and could have been.

Litz further alleges her attorney in the first action "neglected to present at the trial when he should have," (a) the statement of decision in the real estate commission case in which the court said "the TRO was dissolved by operation of law," (b) the answer Thomas prepared in that action describing the TRO's expiration provision at the date and time of the court hearing and stating the hearing was set for September 25, 1984, and (c) Thomas's deposition for the first action in which he stated he was "not really sure" the TRO was in effect after September 25, 1984, although he "suppose[d]" the TRO was still in effect a month or so later.

Litz alleges she paid her attorney in the first action $36,000 and, with respect to an additional $92,500 billed for this action, was forced into bankruptcy under chapter seven.

The Trial Court's Ruling

In its ruling on the demurrer the trial court found that the causes of action asserted in the complaint were the same as those asserted in the cross-complaint in the first action, and the judgment for Thomas in the first action is a bar to this

action. The trial court also determined the complaint shows on its face that it seeks collaterally to attack the judgment in the first action but fails to allege legally sufficient grounds.

DISCUSSION

Extrinsic or Intrinsic Fraud

Litz argues that in the first action "there was not only fraud on the court, preventing a fair trial for me, but intrinsic fraud (perjury on the part of Mr. Thomas), and extrinsic fraud or mistake (brain tumor disability illness -- or egregious conduct of my attorney . . . so as to fail to win my very winnable case, as shown herein)." (Original emphasis.) Litz makes it clear that in this 1993 action she seeks to set aside the November 1990 judgment entered after the jury trial in the first action. Asserting her right to file an independent action for fraud, Litz states, in part, "To maintain an independent action in equity to set aside a judgment, it is not necessary to have first made a motion for that relief in the action in which judgment was rendered, under Code Civ. Proc. Sec. 473, 3rd or 6th paragraph, or by an equitable motion; rather the aggrieved party may seek relief directly by an independent action in equity ... The courts have ruled that equity must allow the separate action regardless of any earlier opportunity to move for the same relief in the action in which the judgment was rendered. (Citation.)"

In deciding whether Litz is entitled to any relief we must follow the rule that after the six-month period allowed under Code of Civil Procedure section 473 to seek relief on the basis of mistake, inadvertence, surprise or excusable neglect, "'there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted.'" Rappleyea v. Campbell (1994) 8 Cal.4th 975, 982, quoting In re Marriage of Stevenot (1984) 154 Cal.App.3d 1051, 1071; see Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) The general rule, controlling in this case, is:

"If the aggrieved party had a reasonable opportunity to appear and litigate his claim or defense, fraud occurring in the course of the proceeding is not a ground for equitable relief. The theory is that these matters will ordinarily be exposed during the trial by diligence of the party and his counsel, and that the occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability of final judgments." (8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, S 221, p. 625, and see cases cited at p. 626.)

Witkin also points out "[t]he cases on intrinsic fraud, involving perjury, false documents and other reprehensible conduct by the adverse party, are far more compelling [than extrinsic fraud], yet relief is uniformly denied for good reason." (8 Witkin, Cal. Procedure, supra, at S 215, p. 618 (original emphasis); see Kulchar v. Kulchar (1969) 1 Cal.3d 467, 472, fn. 2.) On what is intrinsic fraud, Stevenot, supra, 154 Cal.App.3d at pages 1069-1070, states:

"Any fraud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if he or she had the opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his or her adversary, but unreasonably neglected to do so.

"When a claim of fraud goes to an issue involving the merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud . . . [¶] When a party was represented by counsel, absent concealment, any fraud will usually be intrinsic."

Defining extrinsic fraud, Kulchar, supra, 1 Cal.3d at page 471, points out, "[e]xtrinsic fraud usually arises when a

party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some cases fraudulently prevented from presenting his claim or defense.'" (Quoting predecessor to 8 Witkin, Cal. Procedure, supra, at S 204, p. 602.) Moreover, the rule is:

> "Whether the case involves intrinsic or extrinsic fraud or mistake is not determined abstractly. 'It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case.' [Citation.]" Kulchar, supra, 2 Cal.3d at p. 473.)

The matters of which Litz complains, the TRO and Thomas's related statements and activities, occurred long before the trial of the first action. The alleged lies, consisting of Thomas's testimony in the first action about the TRO remaining effective after the first hearing date for the OSC and about Litz refusing to release the TRO, could readily be contradicted at that trial. All of these matters occurring in 1984, 1985, 1988 and 1989 were either known personally to Litz or easily discoverable. There is no concealment involved in those matters.

We thus have a case of intrinsic fraud for which there is no relief under the above-stated rules. (Kulchar, supra , 1 Cal.3d at pp. 472-473 ["Courts deny relief . . . when the fraud or mistake is 'intrinsic'; that is, when it 'goes to the merits of the prior proceedings, which should have been guarded against by the plaintiff at that time.' [Citation.]"].)

With respect to the conduct of Litz's attorney in the first action, there are no properly pled allegations in the complaint that would support a right to relief. We note the law partner's letter (on which Litz relies) itself precludes any reasonable inference that her attorney was suffering from the brain tumor during or before the trial of the first action.

Res Judicata

"A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action." (Olwell v. Hopkins (1946) 28 Cal.2d 147, 152.) The trial court took judicial notice of the superior court file in the first action. Judgment in that 1990 case is long since final. Litz's complaint makes numerous references to the first action and the relief it sought. In fact, her complaint recognizes "the jury believed THOMAS" in connection with the lies she alleges. It is clear the complaint sought vindication of the same primary right involved in the first action. Of course the parties are the same. Accordingly, the present action is barred by the doctrine of res judicata.

It is clear, too, that no amendment of the complaint would serve a useful purpose. (See Ricard v. Grobstein, Goldman, Stevenson, Seigel, LeVine & Mangel (1992) 6 Cal.App.4th 157, 160.) It follows the demurrer was properly sustained without leave to amend.

DISPOSITION

Judgment affirmed.

/s/ Nares
NARES, J.

WE CONCUR:

/s/ Work
WORK, Acting P.J.

/s/ Froehlich
FROEHLICH, J.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

Filed--Stephen M. Kelly, Clerk
Jul 25 1995
Court of Appeal Fourth District

BILLIE J. LITZ, Plaintiff and Appellant, v. JOHN HARDY THOMAS, Defendant and Respondent.	) ORDER MODIFYING) OPINION AND DENYING) PETITION FOR) REHEARING)) D021030) [No Change in Judgment]) (Super. Ct. No. 667516))

THE COURT:

The opinion in the above-entitled case, filed July 5, 1995, is modified in the following respect:

On page 1, the first sentence of the second paragraph is amended to read:

> Billie J. Litz, in propria persona, appeals a judgment of dismissal entered after the trial court sustained without leave to amend a demurrer to her first amended complaint for damages for fraud.

There is no change in judgment. The petition for rehearing is denied.

/s/ Froehlich
FROEHLICH, Acting P. J.

Copies to: All parties

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division One

Filed -- Stephen M. Kelly, Clerk
Jul 31 1995
Court of Appeal Fourth District

LITZ, BILLIE J.,
Plaintiff-Appellant
v.
THOMAS, JOHN HARDY
Defendant-Respondent
D021030
San Diego County No. 667516

THE COURT:

Appellant's request to have necessary documents as exhibits in petition for rehearing is DENIED.

/s/ Work
Acting Presiding Justice

cc: All Counsel

Fourth Appellate District, Division One, No. D021030
S048197

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
Filed --Sept 27 1995
Robert Wandruff Clerk
Deputy

BILLIE J. LITZ, Appellant

v.

JOHN HARDY THOMAS, Respondent

Petition for review DENIED.

/s/ LUCAS
Chief Justice

CALIFORNIA SUPERIOR COURT
COUNTY OF SAN DIEGO

ENTERED
Apr 05 1994
Judgment Book 2367 Pg 281

Filed--Kenneth E. Martone
Clerk of the Superior Court
Mar 31 1994
By: J. Johnson, Deputy

BILLIE J. LITZ, Plaintiff,	)	Case No. 667516
vs.	)	JUDGMENT OF
JOHN HARDY THOMAS, et al., Defendants.	)	DISMISSAL

On February 8, 1994 this court entered its order sustaining defendant Thomas' demurrer to the first amended complaint without leave to amend. Accordingly, Defendant has judgment against Plaintiff. Plaintiff is to recover nothing and Plaintiff's action is dismissed.

Defendant has judgment against Plaintiff for $196.00 in costs.

/s/ Robert Baxley
ROBERT C. BAXLEY
JUDGE OF THE SUPERIOR COURT

DATED: March 31, 1994

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Filed--Kenneth E. Martone
Clerk of the Superior Court
Feb 08, 1994
By: E. Leyba, Deputy

BILLIE J. LITZ, Plaintiff, v. JOHN HARDY THOMAS, attorney, and DOES 1-10, Defendant.	) CASE NO. 667516)) ORDER SUSTAINING) DEMURRER TO) FIRST AMENDED) COMPLAINT,) WITHOUT LEAVE) TO AMEND

The demurrer of the Defendant, JOHN HARDY THOMAS, to the First Amended Complaint herein came on regularly for hearing, after telephonic ruling, on January 28, 1994 at 9:00 a.m. in Department 24 of the above-entitled Court before the Hon. Robert Baxley. Plaintiff, BILLIE J. LITZ, appeared In Propria Persona, and Defendant and demurring party, JOHN HARDY THOMAS, appeared through counsel, James J. Biggins, Jr., appearing specially. The court, having read and considered the supporting and opposing points and authorities, and having heard and considered the arguments of the parties, and good cause appearing therefore,

IT IS ORDERED that the demurrer be, and hereby is, sustained without leave to amend on the grounds that the First Amended Complaint does not state facts sufficient to constitute a cause of action in that:

(1) It shows on its face that Defendant JOHN HARDY THOMAS obtained a final judgment on the merits against Plaintiff in action no. 595034, Thomas v. Litz, before this court, which action is referred to in paragraphs 10, 14, 29 and others of the First Amended Complaint, that the causes of

action asserted in the First Amended Complaint, are the same as those asserted by Plaintiff in her Cross-Complaint in the former action, and the judgment rendered in the former action is a bar to the maintenance of this action.

(2) The First Amended Complaint shows on its face that it seeks collaterally to attack the judgment in said former action but fails to allege legally sufficient grounds.

/s/ Robert Baxley
Hon. Robert Baxley
JUDGE OF THE SUPERIOR COURT

DATED: Feb. 8, 1994

Litz v. Thomas, SDSC, Case No. 667516

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

BILLIE J. LITZ, PLAINTIFF, v. JOHN HARDY THOMAS, DEFENDANT.	)	S.C. NO. 667516

TRANSCRIPT OF PROCEEDINGS
FRIDAY, JANUARY 28, 1994
SAN DIEGO, CALIFORNIA

- ORAL ARGUMENT -

APPEARANCES:

FOR THE PLAINTIFF:	BY: BILLIE J. LITZ IN PRO PER
FOR THE DEFENDANT	BY: JAMES J. BIGGINS ATTORNEY AT LAW

MERCEDES SANCHEZ, CSR 7377
OFFICIAL REPORTER PRO TEMPORE

SAN DIEGO, CALIFORNIA,
FRIDAY, JANUARY 28, 1994, 9:00 A.M.

* * * *

THE COURT: NUMBER 10.

MR. BIGGINS: READY, YOUR HONOR. JAMES BIGGINS APPEARING SPECIALLY FOR THE DEFENDANT AND THE DEMURRING PARTY.

MS. LITZ: BILLIE LITZ, IN PRO PER.

THE COURT: DO YOU KNOW WHAT THE TENTATIVE IS, MS. LITZ?

MS. LITZ: YES, I DO. I THINK THAT YOU SAID THAT THE TENTATIVE -- THE DEMURRER HAS MERIT. I AGREE THAT THE DEMURRER HAS MERIT. HOWEVER, I KNOW THAT MY CASE HAS MERIT, TOO. AND I THINK THAT THERE IS A DIFFERENCE IN THE TWO CASES. THE PREVIOUS CASE WAS 595034, THE FEES/MALPRACTICE /CONVERSION CASE BETWEEN THE SAME PARTIES. BUT THIS LAWSUIT IS FOR FRAUD BECAUSE I HAVE DISCOVERED SINCE THE TRIAL THAT HE LIED UNDER OATH AT THE TRIAL ABOUT THE MOST IMPORTANT MATTER THAT HAD TO DO WITH ALL THE LITIGATION THAT HAS COME ABOUT SINCE 1984 WHEN HE FIRST STARTED MY CASE. I FIND MYSELF IN A POSITION OF NOT BEING ABLE TO HIRE AN ATTORNEY BECAUSE MR. THOMAS SAID THAT IN HIS LAST CASE HE HAD NO MALPRACTICE INSURANCE AND I CANNOT PAY ONE. SO I'M HAVING TO HANDLE THIS MYSELF.

NOW, I GO TO THE LAW LIBRARY PRACTICALLY EVERY NIGHT AND I THINK THAT THERE'S A DIFFERENCE IN FRAUD AND NEGLIGENCE, MALPRACTICE, BREACH OF FIDUCIARY DUTY, AND CONVERSION. HE WAS NOT SUED FOR FRAUD IN THE FIRST CASE. HOWEVER, IF THE COURT FINDS THAT THIS LAWSUIT IS THE

SAME CASE AND IT IS RES JUDICATA AND COLLATERAL ESTOPPEL, I'VE READ THAT IN A COURT OF EQUITY THE SUPERIOR COURT HAS THE POWER TO GIVE RELIEF FROM A JUDGMENT PROCURED BY FRAUD. AND I KNOW THAT WE CAN'T SET IT ASIDE BECAUSE OF THE PERJURY, WHICH IS INTRINSIC FRAUD, BUT EXTRINSIC FRAUD OR MISTAKE.

MY ATTORNEY, STEVEN LANDE, AT THE OTHER CASE HAS RETIRED FROM THE PRACTICE OF LAW BECAUSE HE HAS A MALIGNANT BRAIN TUMOR. AND I JUST DISCOVERED THIS THIS LAST MAY. AND PRIOR TO THAT, AFTER THE TRIAL I HAD GONE TO COUNSELING FOR SEVERE EMOTIONAL DISTRESS, LOSING A CASE THAT I SHOULD HAVE WON, AND KNOWING THAT MR. THOMAS LIED UNDER OATH ABOUT THAT BUT NOT BEING ABLE TO PROVE IT.

I CAN NOW PROVE THAT IN DOCUMENTARY EVIDENCE, NOT MY WORD AGAINST HIS. AND I WANT TO USE ONE OF THE FORMS THAT I READ ABOUT, OPPOSING THE DEMURRER TO THE COMPLAINT, CODE OF CIVIL PROCEDURE 430.10(E) IN EQUITY TO VACATE AND SET ASIDE THE JUDGMENT. THERE ARE FORMS 206 OR 207, WHICH IS TO DO WITH THE DISABILITY OF MY ATTORNEY AND/OR HIS INEXCUSABLE NEGLECT.

I HAVE A TRANSCRIPT OF THE TRIAL IN WHICH HE LIED UNDER OATH. HE SAID THAT HE RESENTED MR. BIGGINS SAYING THAT HE HAD ME MORTGAGE MY HOUSE IN ORDER TO GET A $25,000 DEPOSIT OR -- YOU KNOW, $25,000 RETAINER FOR HIM. THAT IS EXACTLY WHAT I DID. AND I HAVE THE LETTER TO PROVE THAT. HE SAID, "WHEN THE LOAN COMES THROUGH WE'LL PREPARE THE PAPERS FOR YOU TO SIGN AND THE CONTRACT." AND HE EITHER DIDN'T REMEMBER THAT, WHICH WAS PART OF THE REASON OF HIS BRAIN TUMOR SITUATION, AS I UNDERSTAND IT, IS HE DOESN'T

REMEMBER.

HE DIDN'T REMEMBER OTHER EVIDENCE THAT HE SHOULD HAVE REMEMBERED TO IMPEACH THE TESTIMONY OF MR. THOMAS WHEN HE WAS ON THE STAND LYING UNDER OATH OR HE WAS INEXCUSABLY NEGLIGENT. AND BOTH OF THOSE, AS I UNDERSTAND IT, ARE GROUNDS FOR SETTING ASIDE A JUDGMENT LIKE THIS.

I DON'T KNOW WHETHER MY COURSE HAS BEEN PROPER AS FAR AS FILING THIS LAWSUIT FIRST, BUT I WAS CONCERNED ABOUT THE STATUTE, THAT I WANTED TO DO IT WITHIN THE THREE YEARS. IT SAYS SOMEWHERE IN HERE THAT YOU CAN FILE AN INDEPENDENT ACTION IN EQUITY AND -- I DON'T KNOW HOW TO QUOTE ALL OF THESE THINGS, BUT I HAVE READ THAT ENTIRE BOOK ON RELIEF OF JUDGMENTS AND I HAVE IN MY PAPERS TO THE COURT PUT FACTS THAT MAY NOT BE IN THE PROPER ORDER. BUT AS I LEARN I WILL PUT THEM IN BETTER ORDER OR I'LL MAYBE HIRE SOMEBODY TO PUT THEM IN BETTER ORDER IF YOU WANT ME TO AMEND THE COMPLAINT, WHATEVER. BUT I KNOW THAT I HAVE PUT THEM IN THERE AND THEY ALL SAY WHAT HAS HAPPENED HERE.

I THINK THAT EVERY CRITERIA TO SET ASIDE THIS CASE IS IN THE PAPERS I'VE ALREADY FILED, IN OTHER WORDS. AND I GAVE A COPY OF THAT CASE OF DE ZEMPLEN VERSUS HOME FEDERAL IN WHICH IT SAID THAT "CONSTRUCTION SHOULD BE LIBERAL WITH A VIEW TO SUBSTANTIAL JUSTICE BETWEEN THE PARTIES. A PLEADING OF FACTS ENTITLING PLAINTIFF TO SOME RELIEF IS ALL THAT IS NECESSARY AGAINST A GENERAL DEMURRER." I DON'T KNOW WHETHER MR. THOMAS'S IS A GENERAL DEMURRER, BUT I BELIEVE IT IS.

AND LIBERAL CONSTRUCTION: "WHILE, ORDINARILY, PROCEDURE DEMANDS A STRICT

ENFORCEMENT OF THE RULINGS OF THE PLEADING, THE BASIC SYSTEM OF THE CODE OF CALIFORNIA IS THAT THE ADMINISTRATION OF JUSTICE SHALL NOT BE EMBARRASSED BY TECHNICALITIES, STRICT RULES OF CONSTRUCTION, OR USELESS FORMS."

I HAVE DONE THE BEST I CAN ON THIS LATEST THING THAT MR. THOMAS HAS FILED, THE REPLY TO THE OPPOSITION. HE HAS GIVEN A CASE HERE THAT IS NOT RELEVANT TO WHAT HAS HAPPENED, RICARD VERSUS GROBSTEIN. IN THAT ONE A CASE WAS BROUGHT WHERE THEY WERE TRYING TO GET AROUND A COURT'S ORDER. I'M NOT TRYING TO DO THIS AT ALL. I HAVE BEEN TRYING TO BRING THIS TO THE ATTENTION OF THE COURT IN THE BEST WAY THAT I KNOW HOW.

THE COURT: ALL RIGHT. MR. BIGGINS?

MR. BIGGINS: IF IT PLEASE THE COURT, YOUR HONOR, THIS CASE -- THE ORIGINAL CASE WAS TRIED IN DECEMBER OF 1990 AND PRIOR TO THAT FOR SOMETIME MS. LITZ WAS REPRESENTED BY MR. STEVEN LANDE. MR. LANDE WAS NOT SUFFERING FROM HIS BRAIN TUMOR, AT LEAST AS FAR AS THE EVIDENCE BEFORE THE COURT IS CONCERNED. THERE IS A LETTER IN ONE OF MRS. LITZ' EXHIBITS THAT SAID THAT HE WAS OPERATED ON IN '92 AND THAT THE BEST INFORMATION THAT HIS PARTNER HAD, AS THE PERSON RESPONDING TO HER INQUIRY, WAS THAT THE TUMOR HAD COMMENCED GROWING IN SIX TO EIGHT MONTHS PRIOR TO THE TIME OF THE OPERATION.

MR. LANDE WAS VERY, VERY ACTIVE IN THE BEST TRADITIONS OF THE LOS ANGELES BAR IN PREPARATION AND TRIAL OF THIS CASE. ANYTHING THAT HAPPENED BETWEEN THESE PARTIES EITHER HAPPENED AT OR DURING THE TRIAL OR BEFORE THE TRIAL. THE JUDGMENT INCLUDES THE VERDICT. IT WAS A SPECIAL

VERDICT. IT COVERED BREACH OF FIDUCIARY DUTY, TO WHICH THE JURY FOUND NONE, NEGLIGENCE, WHICH THE JURY FOUND NONE, CONVERSION, TO WHICH THE JURY FOUND NONE. THERE WAS A FINDING BY JUDGE JOHNSON THAT THERE WAS A TEMPORARY CONVERSION GENERATING DAMAGES FOR SOME $300.

THE COURT: $359.

MR. BIGGINS: SO WHATEVER COULD HAVE BEEN TRIED SHOULD HAVE BEEN TRIED AT THE TIME OF THE TRIAL IN 1990. I DON'T BELIEVE THERE'S ANY REAL CLEAR-CUT ALLEGATIONS MR. THOMAS LIED DURING THE TRIAL. THAT WOULD BE -- AND HE HASN'T ARGUED THIS IN HIS PAPERS WHICH HE'S SUBMITTED. HE HASN'T TALKED ABOUT COLLATERAL ATTACHMENT OF JUDGMENTS. BUT IT CERTAINLY WOULD BE INTRINSIC FRAUD OR SOME INTRINSIC MISCONDUCT. AND MY UNDERSTANDING, AND IT'S HORNBOOK LAW, THERE HAS TO BE SOME EXTRINSIC LAW WHICH ACTUALLY PREVENTS THE OTHER PARTY FROM GETTING INTO HIS OR HER DAY IN COURT.

SO IT SEEMS TO ME THAT IT'S EITHER SOMETHING WHICH WAS TRIED, SHOULD HAVE BEEN TRIED, OR SOMETHING WHICH HAPPENED DURING THE TRIAL, IN WHICH CASE THERE'S NOTHING IN THE COMPLAINT, THE FIRST AMENDED COMPLAINT, THAT WOULD JUSTIFY A COLLATERAL ATTACK OR SUPPORT A COLLATERAL ATTACK ON THAT JUDGMENT. SO IT'S BEEN -- THESE PARTIES HAVE BEEN INVOLVED IN THIS OVER MANY, MANY YEARS, BUT IT SEEMS TO ME THAT WE'VE REACHED THE POINT WHERE IT'S GOT TO END FOR EVERYONE'S SAKE, MS. LITZ AS WELL AS MR. THOMAS.

THE COURT: ALL RIGHT. MS. LITZ, I BELIEVE THAT THE DEMURRER IS APPROPRIATE AND I'M GOING TO SUSTAIN IT WITHOUT LEAVE TO

AMEND.

MR. BIGGINS: I'LL PREPARE AN ORDER, YOUR HONOR. THANK YOU.

(CONCLUSION OF PROCEEDINGS.)

* * * *

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APPELLANT BILLIE J. LITZ' OPENING BRIEF
TABLE OF AUTHORITIES

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90 U.S. 61, 65-66. 25 L.Ed 93.

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Statutes:

CIVIL CODE Section 3528: "First duty of equity is to be equitable; court of equity is bound to consider substance over form."

Constitutions:

United States, Amendment 14 (Page 0166 C.T.)
State of California
Article III, Sec. 1 (Page 0167 C.T.)

Other Authorities:

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FORM 206 and 207 - Opposing Demurrer (CIV. PROC. 430.10(e) to set aside judgment obtained by extrinsic fraud or mistake - disability of attorney, etc. (Page 3 lines 11-16 in REPORTER'S TRANSCRIPT).
**Points and Authorities, 5A-Law and Motion Practice - BLACK BENDER's - Pg. 452-462 --

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CONSTITUTIONAL PROVISIONS SET OUT VERBATIM

CONSTITUTION OF THE UNITED STATES OF AMERICA, Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF CALIFORNIA, Article III

Section 1. The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land. (New section adopted November 7, 1972).